No. 89-136

In The

Supreme Court of the United States

October Term, 1989

HARNEY & MOORE, a Partnership and
DAVID M. HARNEY,

Petitioners,

vs.

JAY MARK FINEBERG,

Respondent.

On Petition For Writ Of Certiorari To The California Court of Appeal, Second Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARSHALL C. SANDERS and THOMAS H. JANEWAY
SANDERS, FIRESTEIN & JANEWAY
16530 Ventura Boulevard, Suite 600
Encino, California 91436
(818) 995-1900

Attorneys for Respondent
Jay Mark Fineberg

COCKLE LAW BRIEF PRINTING CO., (800) 225-6464
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Petition for Writ of Certiorari should properly be phrased as follows:

1. Did the state courts address and correctly decide the federal questions raised by Petitioners on appeal?

2. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of his right to retain counsel under the due process clause of the Fourteenth Amendment of the United States Constitution?

3. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of the constitutional right to petition the government for a redress of grievances?

4. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of the constitutional right to equal protection of the laws guaranteed under the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

FACTS

Respondent JAY MARK FINEBERG ("FINEBERG") filed his Complaint in this action against Petitioners HARNEY & MOORE and DAVID M. HARNEY[1] on January 29, 1986 for imposition of a constructive trust, for breach of statutory duty, for money had and received, and for declaratory relief. The gravamen of FINEBERG's Complaint was that Petitioners had impermissably induced him to enter into a contingent fee agreement for legal services in connection with a medical malpractice action which contravened the mandatory statutory limitations imposed by California *Business and Professions Code* §6146[2]. The relief requested by FINEBERG in the instant action includes a refund of the amount due him, with interest at the rate of ten percent per annum from the date on which Petitioners wrongfully withheld the money, together with a request for a declaration of the rights of the parties pursuant to the contingent fee agreement and *Business and Professions Code* §6146, and for imposition of a constructive trust.

---

[1] The Complaint also named as a Defendant CHRISTOPHER GRANVILLE-MATHEWS who was dismissed from the case before an answer was filed (C.T. page 93)

[2] In 1975 the California Legislature enacted the Medical Injury Compensation Reform Act ("MICRA"), including §6146, in response to a perceived crisis in the health care delivery system, to reduce the cost of medical malpractice insurance.

On May 21, 1986 Petitioners filed a Cross-Complaint of which only the Fourth Cause of Action, for declaratory relief, remained before the court at the time of trial. The First, Second and Third Causes of Action were dismissed by the court pursuant to a demurrer filed by Respondent, and Petitioners elected not to file an amended Cross-Complaint.

On May 21, 1986 Petitioners also filed their Answer denying the allegations of the Complaint and affirmatively alleging, in relevant part, that Respondent waived the fee limitations set forth in *Business and Professions Code* §6146, and in doing so never intended *Business and Professions Code* §6146 to apply to the fee agreement.

The trial came on regularly for hearing on November 6, 1987 in Department 19 of the Los Angeles County Superior Court, the Honorable Robert Fainer, Judge Presiding, sitting without a jury; a jury having been duly waived by the parties. Because the trial took less then one day to try and decide, and because no Statement of Decision was requested under California *Civil Code* §632, the Judgment was entered without a Statement of Decision. Nevertheless, the Judgment entered on January 4, 1988, in favor of Petitioners HARNEY & MOORE and DAVID M. HARNEY, and against Respondent JAY MARK FINEBERG, provided that:

> "1. Plaintiff [Respondent] shall take nothing by reason of the complaint on file herein.
>
> 2. *Business and Professions Code* §6146 is inapplicable to the fee agreement dated November 23, 1981 between the parties because Plaintiff [Respondent] knowingly, freely and voluntarily waived the provisions *Business and Professions*

Code §6146 and there is no public policy which would prevent the Plaintiff [Respondent] from knowingly, freely, and voluntarily waiving the provisions of *Business and Professions Code* §6146."

(C.T. pages 81-82)

REASONS FOR DENYING THE WRIT

I.

THE STATE COURT ADDRESSED AND CORRECTLY DECIDED THE FEDERAL QUESTIONS RAISED BY PETITIONERS ON APPEAL

The Petitioners' contention that review by the Supreme Court is appropriate rests on the fallacious premise that the California Court of Appeal "did not address the constitutional issues raised by petitioners". In fact, as the opinion of the Court of Appeal clearly reflects, and as discussed below in greater detail, the Petitioners' constitutional claims that §6146 would violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and would deprive litigants of the right to petition for a redress of grievances by employing counsel of their choice, were addressed and then rejected (see *Fineberg vs. Harney & Moore* (1989) 207 Cal App 3d 1049, 1053-1055). The Court of Appeals opinion was not an aberration; it was based upon a careful review of the statute's legislative history, and prior appellate cases which have construed §6146, including the same constitutional challenges raised by Petitioners' in the instant case (see *Fineberg, supra,* at pages 1053-1055).

Petitioners also contend that the limitations imposed by §6146 are voidable pursuant to *California Business and Professions Code* §6146. However, it is noteworthy that §6147 was not enacted as part of the MICRA statutes in 1975, and that it was not in effect when the Respondent signed the Petitioners' retainer agreement on November 26, 1981. Section 6146 was not enacted until 1982.

In addition, the Petitioners' contention that §6147 renders fee agreement subject to §6146 voidable, at the option of the plaintiff, conflicts with the express language of the statute which states that "[a]n attorney *shall not* contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider. . . ." The word "shall" ordinarily connotes mandatory action when employed in a statute (*Ford Motor Credit vs. Price* (1985) 163 Cal App 3d 745, 749).

In the case of *Hathaway vs. Baldwin Park Community Hospital* (1986) 186 Cal App 3d 1247, the Court of Appeals reviewed the legislative history of §6146 and stated

> "It is abundantly clear . . . that the Legislature considered vesting the trial court with the authority to set reasonable attorneys' fees and specifically rejected this proposal."
>
> (*Hathaway, supra*, at pages 1252-1253).

The Petitioners' argument that the contingency fee agreement here in issue is voidable because it does not recite that the rates set forth in §6146 are the "maximum limits of the contingency fee agreement" ignores the fact that the agreement contains a verbatim statement of the provisions of §6146 (C.T. page 9), reciting the maximum

limits which attorneys may charge clients, as required by §6147(a)(5). Neither §6146 nor §6147 provides that an attorney may charge a fee in excess of the mandatory fee limitations imposed by §6146 by the simple expedient of inducing a client to execute a waiver of those mandatory limits.

Alderman vs. Hamilton (1988) 205 Cal App 3d 1033, cited by the Petitioners, may be distinguished because that case involves a contingent fee agreement in a will contest, and it is not a medical malpractice case subject to §6146. Moreover, the issues raised in *Alderman* were not that the parties' contingency fee agreement violated §6146, but that it violated a statutory requirement of §6147 requiring such agreements to include a statement of how disbursements would affect the contingency fee, any related matters, and that the fee was negotiable (*Alderman, supra,* at page 1037).

The Petitioners are requesting, in essence, that this court reexamine the legal authorities upon which the Court of Appeals relied in authoring its opinion and the California Supreme Court relied in issuing its order denying the Petition for Review. However, the Petitioners' constitutional arguments were previously addressed below by the Court of Appeals, and similar arguments have been raised in numerous prior cases which are referred to in the opinion by the Court of Appeals (*Fineberg, supra,* at pages 1052-1056). The Supreme Court accords "respectful consideration and great weight to the views of a state's highest court" on matters of state law and customarily accepts factual findings of state courts in the absence of "exceptional circumstances" (*California*

Retail Liquor Dealers Ass'n. vs. Midcal Aluminum, Inc. 445 U.S. 97, ___, 100 S.Ct. 937, ___, 63 L.Ed. 2d 233 (1980)).

II.

THE MANDATORY FEE LIMITATION IMPOSED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF HIS RIGHT TO RETAIN COUNSEL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioners' argument that the mandatory sliding-scale fee limitation imposed by §6146 would somehow impinge upon the Respondent's constitutional right to retain counsel to represent him in a medical malpractice action is without merit. The Respondent unquestionably had a constitutional right to select and retain counsel to represent him in the underlying medical malpractice action. Due process assures that right (see *Powell vs. Alabama* 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 159 (1932); *In re Kathy P.* (1979) 25 Cal 3d 91, 102; *Mendoza vs. Small Claims Court* (1958) 49 Cal 2d 668, 673).

However, the due process argument raised by Petitioners misrepresents the impact which §6146 imposes on the constitutional right to employ legal counsel. In *Roa vs. Lodi Medical Group, Inc.* (1985) 37 Cal 3d 920, the California Supreme Court held that §6146 "does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee agreement" (*Roa, supra,* at p. 926). Moreover, the due process clause does not establish a constitutional requirement

that an attorney selected by a party must agree to represent that party. In *Powell vs. Alabama* the Supreme Court held that the due process clause simply requires that a " . . . defendant should be afforded a fair opportunity to secure counsel of his choice" (*Powell, supra,* at page 53).

The right to counsel does not confer a corresponding constitutional right which allows counsel retained in medical malpractice actions to insist that the legal representation be contingent upon waiver of a "public interest" statute which imposes reasonable limitations on attorney's fees. Petitioners have not cited any authority for such a novel proposal.

California *Civil Code* §3513 provides that:

> "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

A statute which is enacted as an expression of California public policy may not be waived by contract when it was established for a public reason (*Cook vs. King Manor and Convalescent Hosp.* (1974) 40 Cal App 3d 782, 792-793).

In *Roa vs. Lodi Medical Group* the California Supreme Court reviewed the public reasons why §6146 was enacted by the California Legislature in 1975. After reviewing the legislative history of the statute, and prior court decisions which had construed other MICRA statutes, the Court concluded that the contingency fee limitations imposed by *Business and Professions Codes* §6146 were rationally related to a valid legislative purpose, and held that a rational basis existed for the Act's attorney fee restrictions (*Roa, supra,* at page 930). The California

Supreme Court determined that the public purpose of the Act was to reduce the cost of medical malpractice insurance and thereby (1) induce hospitals and doctors to resume providing medical care to all segments of society, and (2) guarantee that insurance would be available as compensation for patients injured through medical malpractice (*Roa, supra,* at page 930). The California Supreme Court concluded that the attorney fee limitations of §6146 were rationally related to the foregoing objectives because the statute would encourage plaintiffs to accept lower settlements and would deter attorneys from instituting frivolous suits (*Roa, supra,* at page 931). The California Supreme Court also held that because the MICRA provisions would reduce malpractice victim's recoveries, the attorney fee limitations were necessary to protect their awards from further depletion by high contingency fees (*Roa, supra,* at page 932).

The California Supreme Court also noted that a comparison of the fees permitted under §6146 with the fees authorized under other statutory schemes indicated that §6146's limits are not unusually low, and that the amount of fees permitted does not render the statute unconstitutional on its face (*Roa, supra,* at page 928).

The Petitioners' attempt to demonstrate that the fee limitations imposed by §6146 would, because of financial considerations inherent in a contingency fee arrangement, preclude litigants from engaging the services of experienced counsel or would lower the standard of representation in medical malpractice cases, lacks any factual support and is based upon speculation.

Section 6146 does not *prevent* the Petitioners from earning a living as lawyers, it simply limits the fees which they may recover in handling cases in the subspecialty of medical malpractice tort litigation. The right of attorneys to practice their profession may be made subject to statutory regulations which will be upheld so long as the enactments reflect a rational choice aimed at furthering limited state interests (see *Family Div. Trial Lawyers of Superior Court - D.C., Inc. vs. Moultrie* (C.A.D.C. 1984) 725 F2d 695, 710; *Person vs. Association of Bar of City of New York* (C.A.N.Y. 1977) 554 F2d 534, 537-538, cert. denied, 434 U.S. 924, 98 S.Ct. 403, 54 L.Ed. 2d 282).

III.

THE MANDATORY FEE LIMITATION IMPOSED BY BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF THE CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES

Although there is a constitutional right of access to the courts which arises from the due process clause (*Wolff vs. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed. 2d 935 (1974)), the privileges and immunities clause (*Chambers vs. Baltimore & Ohio Railroad*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907)), and the First Amendment (*California Motor Transport vs. Trucking Unlimited*, 404 U.S. 508, 513, 92 S.Ct. 609, 613, 30 L.Ed. 2d 642 (1972)), "[t]here is no *absolute* and unlimited constitutional right of access to the courts" (*Ciccarelli vs. Carey Canadian Mines, Ltd.* (1985) 757 F2d 548, 554). All that is required is a reasonable right of access; i.e., a reasonable opportunity to be heard (*Boddie vs. Connecticut*, (1974) 401

U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113). The Constitution simply requires "an opportunity . . . granted at a meaningful time and in a meaningful manner" (*Armstrong vs. Manzo* (1965) 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62, 66), "for [a] hearing appropriate to the nature of the case" (*Mullane vs. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-657, 94 L.Ed. 865, 873 (1950)).

Petitioners' argument on this issue is based upon the erroneous assumption that a reasonable regulation of attorney's fees represents a constitutional deprivation of a litigant's right to seek a redress of grievances through the courts. However, *Business and Professions Code* §6146 does not prevent those injured by medical malpractice from seeking redress through the courts; it only limits the fees which counsel retained to represent such litigants may charge. As noted above, legislatures may subject attorneys to statutory regulations which further a legitimate public interest.

Furthermore, a lawyer's opportunity to obtain remunerative employment is a subject which is only marginally affected with First Amendment concerns, and it is a subject which falls within the state's proper sphere of economic and professional regulation (*Ohralik vs. Ohio State Bar Ass'n.* (1978) 436 U.S. 447, 459, 98 S.Ct. 1912, 1920, 56 L.Ed. 2d 444, reh. denied, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed. 2d 198). The state's interest in such cases is particularly strong because in addition to its general interest in protecting consumers and regulating commercial transactions, the state has a special responsibility for maintaining standards among members of the licensed professions (*Ohralik, supra*, at page 460).

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.
>
> * * *
>
> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'." (*Goldfarb vs. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975)).

A regulatory statute, such as §6146, is not invalid merely because it does not cover the whole of a permissible field. The presumption, in such instances, should always be to uphold a classification based on legislative experience, and not to reject it unless plainly arbitrary (*Borden's Farm Products Co. vs. Baldwin*, 293 U.S. 194, 209, 55 S.Ct. 187, 192, 79 L.Ed. 281 (1934)).

IV.

THE MANDATORY FEE LIMITATION IMPOSED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION

As discussed above, the California Legislature had a valid "public reason" for enacting the MICRA statutes, including §6146, in 1975. Furthermore, California *Civil*

Code §3513 provides that a law established for a public reason cannot be contravened by a private agreement.

The classification imposed by §6146 was based upon a legislative determination, after lengthy deliberation, that imposing limits on fee agreements in medical malpractice cases was a necessary step in order to deal with a growing crisis in the field of health care delivery in the State of California. (see *Roa, supra,* at pages 930-931; *Fineberg, supra,* at pages 1052-1053). Although the statute discriminates between attorneys who represent parties claiming injuries resulting from medical malpractice and attorneys representing other types of tort claimants, the discrimination is nevertheless based upon the underlying legislative purpose embraced by the MICRA statutes of combating a crisis concerning health care delivery and medical malpractice insurance. (see *Roa, supra,* at pages 930-932; *Fineberg, supra,* at pages 1053-1054).

> "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it."
>
> (*Asbury Hosp. vs. Cass County,* 326 U.S. 207, 215, 66 S.Ct. 61, 65, 90 L.Ed. 6 (1945); see also *Roa, supra,* at page 930).

Unless a statute requires "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class" it will ordinarily withstand an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose (*Kadrmas vs. Dickinson Public*

Schools, ___ U.S. ___, 108 S.Ct. 2481, 2487, 101 L.Ed. 2d 339 (1988)).

> "[T]he Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.' (Citations omitted). Social and economic legislation like the statute at issue in this case, moreover, 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.' (Citation omitted). '[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' (Citation omitted). In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' (Citation omitted)."
>
> (*Kadrmas, supra*, at pages 2489-2490).

Petitioners' argument that §6146 somehow impinges upon a fundamentally vested constitutional right which they possess is mistaken. It is well-settled that the Constitution does not create fundamental interests in the availability of employment opportunities (*Massachusetts Board of Retirement vs. Murgia* 420 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed. 2d 520 (1976); *Dandridge vs. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1162, 25 L.Ed. 2d 491 (1970)). Section 6146 simply establishes a maximum limit on

attorney's fees which may be charged in medical malpractice cases, it does not prevent the Petitioners, or other attorneys, from practicing in the field of medical malpractice, tort law generally, or indeed the general practice of law. In any event, the right to practice law is not a fundamental right for purposes of due process or equal protection analysis (*Edelstein vs. Wilnetz* (1987) 812 F2d 128, 132; *Lupert vs. California State Bar* (1985) 761 F2d 1325, 1327, fn. 2).

CONCLUSION

The federal issues raised by Petitioners lack substance, have previously been considered by the Supreme Court, or are consistent with prior decisions of the Supreme Court and the lower federal courts. No reviewable question is properly placed before this Court and accordingly Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

DATED: August 21, 1989

Respectfully submitted,

By: Marshall C. Sanders and
Thomas H. Janeway

SANDERS, FIRESTEIN & JANEWAY
16530 Ventura Blvd., Suite 600
Encino, California 91436
(818) 995-1900
Attorneys for Respondent
Jay Mark Fineberg